

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	x	
	:	
UNITED STATES OF AMERICA,	:	Criminal Action
	:	
Plaintiff,	:	No. 2:14-cr-00275
	:	
v.	:	
	:	Date: March 23, 2015
FREEDOM INDUSTRIES, INC.,	:	
	:	
Defendant.	:	
	x	

TRANSCRIPT OF PLEA HEARING HELD
BEFORE THE HONORABLE THOMAS E. JOHNSTON, JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

For the Government:	AUSA PHILIP H. WRIGHT AUSA ERIC P. BACAJ U.S. Attorney's Office P.O. Box 1713 Charleston, WV 25326-1713
For the Defendant:	ROBERT R. LEIGHT, ESQ. PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI One Oxford Centre, 38th Floor 301 Grant Street Pittsburgh, PA 15219
Probation Officer:	Jeff Gwinn
Court Reporter:	Ayme Cochran, RMR, CRR

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 PROCEEDINGS had before The Honorable Thomas E. Johnston,
2 Judge, United States District Court, Southern District of West
3 Virginia, in Charleston, West Virginia, on March 23, 2015, at
4 3:05 p.m., as follows:

5 COURTROOM DEPUTY CLERK: The matter before the Court is
6 the United States of America v. Freedom Industries, criminal
7 action number 2:14-cv-00275, scheduled for a plea hearing.

8 THE COURT: Good afternoon. Will counsel please note
9 their appearances?

10 MR. WRIGHT: Good afternoon, Your Honor. Philip Wright
11 and Eric Bacaj on behalf of the United States.

12 MR. LEIGHT: Robert Leight on behalf of Freedom
13 Industries.

14 THE COURT: Good afternoon. Mr. Welch, I presume?

15 THE DEFENDANT: Yes.

16 THE COURT: Will you please stand, and I will ask the
17 deputy clerk to administer an oath to you at this time.

18 COURTROOM DEPUTY CLERK: Please raise your right hand.

19 **MARK WELCH, DEFENDANT, SWORN**

20 THE COURT: You may be seated.

21 Mr. Welch, do you understand that you are now under oath and
22 you must tell the truth and, if you testify falsely, you may face
23 prosecution for perjury or for making a false statement?

24 THE DEFENDANT: I understand.

25 THE COURT: All right. And throughout the course of

1 this hearing, I'm going to be asking you a number of questions,
2 so -- and I want to make sure that you and I are communicating
3 clearly. So, if at any time I ask a question that you don't
4 understand, or anything else occurs in this proceeding that you
5 don't understand, I want you to feel free to speak up and seek
6 clarification.

7 Also, if at any time you need to confer with your counsel,
8 I'll be pleased to pause the proceedings to allow you to do so.

9 Do you understand all that?

10 THE DEFENDANT: Yes, I understand.

11 THE COURT: All right. A couple of things I want to
12 deal with up front. One is, I want to make note of the fact that
13 -- well, first of all, the plea agreement itself, Mr. Wright, am
14 I correct in saying, has not changed since the courtesy copy
15 provided to my chambers?

16 MR. WRIGHT: The plea agreement has not, Your Honor.

17 THE COURT: All right. And it includes the Written
18 Consent to Action without meeting of the Board of Directors of
19 Freedom Industries, which appears to be a document authorizing
20 the -- it doesn't mention the person by name, but it authorizes
21 the Chief Restructuring Officer to act on behalf -- this is a
22 summary -- to act on behalf of the corporation in this proceeding
23 and related matters; is that correct?

24 MR. WRIGHT: Yes, Your Honor. I submitted a copy of
25 that resolution as Plea Agreement Exhibit C.

1 THE COURT: All right. And you also, as I understand
2 it, and this was -- this was new, the only thing that was new
3 from the original -- or the plea agreement that was provided as a
4 courtesy copy is an affidavit of J. Clifford Forrest, III
5 essentially attesting to the action of the Board of Directors?

6 MR. WRIGHT: Yes, Your Honor. I supplied that
7 affidavit, but I also supplied the original Written Consent to
8 Action, a copy of which is Exhibit C. The original doesn't have
9 an exhibit notation on the bottom of it.

10 THE COURT: All right.

11 Now, Mr. Welch, are you the Chief Restructuring Officer of
12 Freedom Industries?

13 THE DEFENDANT: Yes, I am.

14 THE COURT: All right.

15 All right. Is there any -- so can we agree then that the --
16 and may I so find that the -- that Mr. Welch is appearing before
17 me as an officer or authorized employee of Freedom Industries,
18 Inc.?

19 MR. LEIGHT: Yes, sir.

20 MR. WRIGHT: Yes, Your Honor.

21 THE COURT: And that Mr. Welch has been empowered by
22 the Board of Directors, duly empowered by the Board of Directors,
23 to enter a guilty plea on behalf of Freedom Industries today?

24 MR. WRIGHT: Yes, Your Honor.

25 MR. LEIGHT: Yes, sir.

1 THE COURT: All right. And that is pursuant to a valid
2 resolution which we just discussed, correct?

3 MR. LEIGHT: Yes, sir.

4 MR. WRIGHT: Yes, Your Honor.

5 THE COURT: All right.

6 All right. The other matter I want to just address up front
7 is that I don't think I've ever taken a plea from a corporation
8 like today, so I've tried to tailor my colloquy as best that I --
9 that I normally do with individuals as best I can. Some of it is
10 just naturally going to sound awkward, so just bear with me on
11 that.

12 For example, the first question I have is, do we need to go
13 through a competency colloquy? I kind of came to the conclusion
14 that I might as well. It might be slightly truncated, but I
15 think -- I suppose that one can argue that Mr. Welch needs to be
16 competent to act on behalf of the corporation. So I'm going to
17 proceed and, again, tailor this in a way, as best I can, to not
18 unduly lengthen it or make it any more awkward than it has to be.

19 All right. Mr. Welch, how old are you?

20 THE DEFENDANT: I am 49.

21 THE COURT: Can you briefly describe your educational
22 background?

23 THE DEFENDANT: An undergraduate in Accounting, with a
24 CPA, certified general professional, and I work for a firm called
25 Morris-Anderson & Associates.

1 THE COURT: And what do you do for them?

2 THE DEFENDANT: I do restructuring. I do turnaround.
3 I do forensic analysis. I do litigation support, and mostly in
4 the restructuring.

5 THE COURT: Would it be correct to say that you've been
6 brought in as a consultant to shepherd Freedom Industries
7 through, among other things, its bankruptcy proceedings?

8 THE DEFENDANT: Yes, that's correct.

9 THE COURT: Okay. And are you also participating in
10 that capacity in the Freedom Industries bankruptcy proceedings?

11 THE DEFENDANT: Yes, I am.

12 THE COURT: All right. Have you been authorized by the
13 Bankruptcy Court, as well, to participate as the Chief
14 Restructuring Officer?

15 THE DEFENDANT: Yes. I went through a retention with
16 the court, Bankruptcy Court.

17 THE COURT: All right. And is Freedom Industries
18 considered a debtor in possession in that proceeding?

19 THE DEFENDANT: Yes, it is.

20 THE COURT: All right.

21 All right. Just for the record, can you read and write and
22 understand the English language?

23 THE DEFENDANT: Yes, I can.

24 THE COURT: All right. And, aside from your work as a
25 consultant of this nature, can you otherwise describe your work

1 experience for me?

2 THE DEFENDANT: Yes. I started with the federal
3 government, Office of Inspector General, worked for the Office of
4 Inspector General. I worked as a -- I worked for an airline, and
5 then 16 years at Morris-Anderson.

6 THE COURT: All right. Have you taken any medicine or
7 drugs or consumed any alcoholic beverages within the last
8 24 hours that would in any way affect your -- have side effects
9 or otherwise in any way affect your ability to fully participate
10 in this hearing today?

11 THE DEFENDANT: I've taken cold medicine. I have the
12 flu, but other than that, no, it doesn't affect my abilities.

13 THE COURT: You're fully lucid?

14 THE DEFENDANT: Oh, yeah.

15 THE COURT: All right. Have you ever been treated for
16 any mental illness or addiction to drugs of any kind?

17 THE DEFENDANT: No, I have not.

18 THE COURT: Do you know where you are and why you are
19 here today?

20 THE DEFENDANT: Yes, I do.

21 THE COURT: Do you have any hearing impairment or other
22 disability which would in any way prevent you from fully
23 participating in this hearing today?

24 THE DEFENDANT: I do not.

25 THE COURT: Mr. Leight, do you have any reason to

1 question the competence of Mr. Welch in his capacity as a
2 representative of Freedom Industries, Inc.?

3 MR. LEIGHT: I do not, Your Honor.

4 THE COURT: All right. I established earlier that the
5 original of the plea agreement has been tendered to the Court.

6 Mr. Welch, is that your signature that appears on the ninth
7 and final page of the plea agreement itself?

8 THE DEFENDANT: Yes, it is.

9 THE COURT: And are those your initials appearing on
10 the other pages of the plea agreement?

11 THE DEFENDANT: Yes, they are.

12 THE COURT: And, on behalf of the corporation, have you
13 read and reviewed with Mr. Leight each of the 17 paragraphs of
14 the plea agreement and the exhibits attached thereto?

15 THE DEFENDANT: Yes, I have.

16 THE COURT: And do you wish to have the various terms
17 of the plea agreement orally stated on the record, or do you
18 believe that that's unnecessary?

19 THE DEFENDANT: I believe that's unnecessary.

20 THE COURT: And, on behalf of Freedom Industries, Inc.,
21 do you understand and agree with all of the terms and provisions
22 contained in the plea agreement?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: Have you discussed those terms and
25 provisions with the officers and directors of Freedom Industries?

1 THE DEFENDANT: Yes, I have.

2 THE COURT: And do you believe that they fully
3 understand those terms and provisions, as well?

4 THE DEFENDANT: Yes, they do.

5 THE COURT: Mr. Leight, have you reviewed each of the
6 17 paragraphs of the plea agreement and its exhibits --

7 MR. LEIGHT: I have, Your Honor.

8 THE COURT: -- with your client?

9 MR. LEIGHT: I have.

10 THE COURT: All right. And, Mr. Leight and Mr. Wright,
11 is there any reason why either of you believe that the various
12 terms of the plea agreement should be orally stated on the
13 record?

14 MR. WRIGHT: No, Your Honor.

15 MR. LEIGHT: No, Your Honor.

16 THE COURT: All right. Very well.

17 Nonetheless, Mr. Welch, I want to go over with you some
18 provisions of the plea agreement, beginning with Section 10,
19 which appears on Page 5, and is entitled "Stipulation of Facts
20 and Wavier of Federal Rules of Evidence 410".

21 Now, this section relates to a couple of different matters,
22 the first of which is the Stipulation of Facts, which is attached
23 to the plea agreement as Exhibit B, and I want to turn your
24 attention to that document now.

25 That is an eight-page document and, on the eighth page, is

1 that your signature which appears on behalf of Freedom
2 Industries?

3 THE DEFENDANT: Yes, it is.

4 THE COURT: And have you read the Stipulation of Facts?

5 THE DEFENDANT: Yes, I have.

6 THE COURT: And do you agree that all of the facts
7 contained in the stipulation are true?

8 THE DEFENDANT: Yes, sir. Yes.

9 THE COURT: All right. A little bit about what will be
10 happening from here on out. I will be asking the probation
11 officer to prepare a Presentence Investigation Report. That
12 report will contain detailed recommended factual findings
13 regarding this offense and Freedom's background, among other
14 things.

15 Ultimately --

16 Mr. Leight?

17 MR. LEIGHT: Your Honor, I've discussed with Mr.
18 Wright, and I believe Freedom would be willing to waive a
19 Presentence Report due to the fact it is a bankrupt corporation,
20 if the Court would accept the plea agreement. It really would be
21 unnecessary.

22 THE COURT: I understand your willingness to do that.
23 Why would I have to do that, though, because I have to -- and, I
24 assume, as with any other sentencing, I have to consider the
25 factors under Section 3553(a) of Title 18. In order for me to be

1 able to effectively do that, I need information, which is what I
2 get from the presentence report. So, tell me why I shouldn't do
3 that.

4 MR. LEIGHT: Well, Your Honor, again, Freedom is a
5 bankrupt corporation that will be absolved within a short period
6 of time. The 35 -- we've reached a plea agreement in this case
7 and, if the Court would accept the plea agreement, the sentencing
8 upon Freedom is that it would pay a minimal amount in a fine, and
9 that restitution would be handled through the Bankruptcy Court.
10 To me, it just seems like an unnecessary use of the Court's
11 resources.

12 THE COURT: I probably could have reached the same
13 conclusion when you told me Freedom was going to be dissolved,
14 but the -- I have to -- I have a considerable amount of
15 discretion in -- I mean, I really don't know that I understand
16 what the point of putting a corporation, especially one that's
17 going to be dissolved, on probation is, but that's nonetheless in
18 the plea agreement. So, I've got some discretion I've got to
19 exercise there.

20 And, certainly, I can impose a fine, and I have some
21 discretion I have to exercise there. And, frankly, other than
22 what little I've paid attention to media accounts on this, I
23 don't know much about Freedom Industries and, in order for me to
24 effectively exercise my discretion, I think I need a Presentence
25 Report. I need information, which I don't have. So I'm not

1 going to take you up on that.

2 MR. LEIGHT: Okay.

3 THE COURT: So, let me get back to where I was with
4 regard to the Stipulation of Facts, Mr. Welch. I will be asking
5 the probation officer to prepare a Presentence Investigation
6 Report. That report will -- that may be an unusual report, but
7 I'm going to do one, nonetheless, and that report will contain,
8 among other things, recommended factual findings regarding this
9 offense and the background and information about Freedom
10 Industries as a corporation.

11 Ultimately, I will make factual findings at sentencing based
12 at least in part on the recommendations contained in the
13 Presentence Report.

14 Now, you and the government -- you, on behalf of the
15 company, and the government have reached an agreement regarding
16 certain facts contained in this stipulation, but I want you to
17 understand that, in this process, neither the probation officer,
18 nor this Court, are bound by that Stipulation of Facts. Do you
19 understand that?

20 THE DEFENDANT: Yes, I do.

21 THE COURT: And do you further understand that if I
22 make findings of fact at sentencing that are different from or
23 inconsistent with the facts contained in the stipulation, Freedom
24 Industries will still be bound by its guilty plea and would have
25 no right to withdraw it?

1 (Counsel & defendant confer.)

2 THE DEFENDANT: Yeah, I understand. Yes.

3 THE COURT: All right. Now, the other matter addressed
4 then in Section 10 of the plea agreement is a Waiver of Federal
5 Rule of Evidence 410.

6 Now, first of all, do you understand that a "waiver" is a
7 legal term that means the company is giving something up?

8 THE DEFENDANT: Yes, I do.

9 THE COURT: All right. And Rule 410 generally provides
10 that information or documents regarding plea negotiations, and
11 this Stipulation of Fact would fall into that category, is
12 generally not admissible at trial. In other words, the
13 government can't use that sort of thing against Freedom
14 Industries at trial.

15 However, if Freedom withdraws from this agreement or if the
16 agreement is no longer any good because Freedom has violated one
17 or more of its provisions and there is a subsequent trial, under
18 this waiver, the government would be allowed to present the
19 Stipulation of Facts in its case in chief or for other purposes
20 at that trial.

21 Do you understand that waiver?

22 THE DEFENDANT: Yes, I do.

23 THE COURT: All right. Next, I want to refer you to
24 Section 11 of the plea agreement, which begins on Page 5 and runs
25 over onto Page 6, and is entitled "Agreement on Sentencing

1 Guidelines". Now, has your attorney talked with you about the
2 federal sentencing guidelines and how they generally work, at
3 least as it relates to this case?

4 THE DEFENDANT: Yes. Yes, he has.

5 THE COURT: All right. And has he shown you that chart
6 in the back of the book?

7 THE DEFENDANT: Oh, yes. Yes. It goes back a bit.
8 Been awhile. Yes, he did. Yes, he has.

9 THE COURT: All right. And did he explain to you how
10 the guidelines would be calculated based on that chart?

11 THE DEFENDANT: Yes.

12 THE COURT: All right.

13 All right. Well, I'm going to go through that. I normally
14 would go through that for the record on this occasion, as well.

15 The -- if you'll recall from that chart, on the left side of
16 the page, there's a series of numbers that run from low to high
17 as you go down the page, and those are offense levels, and the
18 offense level is calculated by starting with a Base Offense
19 Level, or a starting point, and that can be adjusted upward or
20 downward, depending on the facts and circumstances of the case,
21 to arrive at an adjusted offense level.

22 I don't know if this applies or not, but the next thing
23 that's generally considered is a reduction for acceptance of
24 responsibility. Has your attorney talked with you about that?

25 THE DEFENDANT: Yes. Yes, he has.

1 THE COURT: All right. And then, one generally arrives
2 then at a Total Offense Level. Then, you go up to the top of the
3 chart, and there are six criminal history categories, and I don't
4 even know how that would apply to a corporation, but I'm assuming
5 the corporation would fall into a criminal history category of I
6 probably, and then you combine the criminal history category,
7 whatever it is, with the Total Offense Level, and arrive at a --
8 at a point in the chart, some of which provides for probation.

9 It also -- that calculation also would arrive at a guideline
10 -- normally arrive at a guideline fine range. I don't know if
11 that -- if the guideline fine range applies in this case or not.

12 At any rate, has your attorney explained all of these things
13 to you?

14 THE DEFENDANT: Yes, he has.

15 THE COURT: All right. And, I guess, the one thing
16 left that I can think of that might still apply, as far as the
17 guidelines go, is that, assuming there is a guideline fine range,
18 I would have the authority to fine the corporation within that
19 range. I would also have the authority to fine the corporation
20 outside of that range, either above it or below it and, if I do
21 that, that's generally known as a departure or a variance.

22 Now, do you understand all that?

23 THE DEFENDANT: I do understand that.

24 THE COURT: All right. And has your attorney explained
25 all of those things to you, as the authorized agent of the

1 corporation?

2 THE DEFENDANT: I understand the fine. However,
3 working through the -- Freedom is a bankrupt estate out of
4 limited resources. So, within the range we talked earlier about,
5 you know, different fine levels and trying to budget it and
6 trying to make this work, extreme fines would be very difficult
7 for the estate. I understand why it's done and I understand the
8 purpose, but I have limited resources. That's the only comment
9 I'd like to make.

10 THE COURT: Well, what -- I appreciate that. Right
11 now, I'm just trying to find my way through this guidelines
12 discussion in this case.

13 THE DEFENDANT: I'm sorry.

14 THE COURT: Well, do you understand the -- my point is
15 that I have the authority to give you a guide -- give the company
16 -- I'm trying to keep in mind that you're not the defendant here.

17 THE DEFENDANT: Uh-huh.

18 THE COURT: I have the authority to give the company a
19 fine within the guideline range, but I also, under some
20 circumstances, would have the authority to give one above or
21 below the guideline range. Do you understand that?

22 THE DEFENDANT: Yes, I understand that.

23 THE COURT: All right. Well, with that in mind, the
24 Presentence Report will contain a guideline calculation and,
25 ultimately -- a recommended guideline calculation and,

1 ultimately, at sentencing, I will make guideline findings based
2 at least in part on that recommendation.

3 Now, this is similar to the Stipulation of Facts in that you
4 have reached an agreement here in Section 11 of the plea
5 agreement with the government regarding one or more -- it
6 actually looks like several provisions of the guidelines, but I
7 want you to understand that, in this process, neither the
8 probation officer, nor this Court, are bound by this guideline
9 calculation. Do you -- or this agreement on the guidelines. Do
10 you understand that?

11 THE DEFENDANT: Yes, I do understand that.

12 THE COURT: And do you further understand that, at
13 sentencing, if I make guideline findings that are different from
14 on inconsistent with the agreement contained in Section 11,
15 Freedom Industries will still be bound by its guilty plea and
16 would have no right to withdraw it? Do you understand that?

17 THE DEFENDANT: Yes, I do understand that.

18 THE COURT: All right.

19 All right. Before we go forward with this, I have a
20 question that's sort of speculating in the back of my mind, and
21 that is, that it seems to me that the only -- the only penalty of
22 any significance that can be imposed in this case is a fine and
23 what is the interaction with any fine that I may impose with
24 what's happening in Bankruptcy Court?

25 MR. WRIGHT: Your Honor, I don't want to mis-state

1 bankruptcy law, but if you impose a fine, I think they have to
2 pay it, and I don't believe it's dischargeable.

3 THE COURT: Mr. Leight, is that your understanding?

4 MR. LEIGHT: It is, Your Honor.

5 (Counsel and defendant confer.)

6 MR. LEIGHT: Mr. Welch would ask the question, if this
7 would be considered a pre-petition obligation to the company or
8 not, which would make a difference.

9 MR. WRIGHT: Your Honor, just off the top of my head,
10 I'm going to say it's not a pre-petition obligation because it
11 wasn't -- it won't be imposed until --

12 THE COURT: Well, at least factually, I would have to
13 agree with you. Whether or not that legally is the case, perhaps
14 there may be a difference, but factually, certainly, that's going
15 to be true, but I understand the petition has long since been
16 filed.

17 MR. LEIGHT: Mr. Welsh -- maybe it would be better for
18 him to address the Court, but he's stated that this was an
19 obligation based upon something that the corporation did before
20 the date of the bankruptcy.

21 THE DEFENDANT: There's -- excuse me. Excuse me. I'm
22 not an attorney. I'm just -- but I deal with bankruptcy a lot.
23 If there's an automatic stay in place and the action happened
24 before bankruptcy, I have to advise my bankruptcy counsel.

25 THE COURT: Was there -- are criminal proceedings

1 subject to the automatic stay?

2 MR. LEIGHT: I believe they are, Your Honor.

3 MR. WRIGHT: I don't think they are.

4 THE DEFENDANT: The fine would be limiting as to the
5 bankruptcy estate.

6 THE COURT: Well, I suppose that's another good reason
7 for a Presentence Report. We'll find out how much money Freedom
8 Industries has available for a fine, as you have indicated that
9 it's limited.

10 All right. Let's press forward with this plea agreement.
11 Section -- well, I want to move on to Section 12 of the plea
12 agreement, which begins on Page 6 and runs over onto Page 7, and
13 is entitled "Waiver of Appeal and Collateral Attack".

14 Has your attorney explained to you what an "appeal" and
15 what a "collateral attack" are as to the authorized agent of the
16 corporation?

17 THE DEFENDANT: Yes.

18 THE COURT: And do you believe you understand those two
19 procedures?

20 THE DEFENDANT: Yes, I do.

21 THE COURT: All right. Well, just for the record, I'm
22 going to run through them anyway. I want to just briefly
23 describe those two procedures.

24 An "appeal" is a procedure by which a party to case before a
25 District Court like this one and, in a criminal case, it is often

1 the defendant, goes to the Court of Appeals, or the next level up
2 of the court system, and argues that certain errors or mistakes
3 may have taken place in their criminal case before the District
4 Court.

5 A "collateral attack" is a similar, but it is a separate
6 civil proceeding, sometimes referred to as a "habeas corpus
7 petition", in which a defendant may also argue that certain
8 errors or mistakes may have taken place in their criminal case
9 before the District Court.

10 Now, do you understand those two procedures, as I've
11 described them?

12 THE DEFENDANT: Yes, I do.

13 THE COURT: All right. With that in mind then, the
14 first paragraph of Section 12 contains an appeal waiver and I
15 want to go over that with you now.

16 Do you understand that Freedom Industries waives the right
17 to appeal its conviction and any fine imposed, or term of
18 probation, or the manner in which the sentence was determined on
19 any ground whatsoever, with one exception: Freedom may appeal a
20 -- any sentence that exceeds the maximum penalties set forth by
21 statute. Do you understand that waiver?

22 THE DEFENDANT: Yes, I do understand that.

23 THE COURT: Anything about that waiver that, on behalf
24 of the corporation, that you don't understand or that you have
25 questions about?

1 THE DEFENDANT: No. I understand it.

2 THE COURT: All right. And do you believe that the
3 appropriate officers and directors of the corporation understand
4 that waiver?

5 THE DEFENDANT: Yes. Yes, I do.

6 THE COURT: All right. Do you also understand that
7 under the second paragraph of Section 12, Freedom Industries may
8 not file a later civil proceeding challenging its plea,
9 conviction or sentence?

10 THE DEFENDANT: Yes. Yes, I do.

11 THE COURT: All right. Finally, do you understand, on
12 behalf of Freedom Industries, that it is in no way waiving its
13 right to claim ineffective assistance of counsel on appeal or by
14 collateral attack?

15 THE DEFENDANT: Yes. Yes, I do understand that.

16 THE COURT: All right. Section 13, now, that's on Page
17 7, and it's entitled "Waiver of FOIA and Privacy Right". Now,
18 this waiver means that Freedom Industries cannot go back after
19 this case is over and seek documents or other information about
20 the case from the government even with a Freedom of Information
21 Act request. Do you understand that?

22 THE DEFENDANT: Yes, I do.

23 THE COURT: All right. Mr. Leight, have you thoroughly
24 reviewed the plea agreement with your client?

25 MR. LEIGHT: I have, Your Honor.

1 THE COURT: And do you believe that Mr. Welch and the
2 officers and directors of Freedom Industries fully understand the
3 various terms and provisions of the plea agreement, including the
4 waivers and other matters that I have gone over with Mr. Welch
5 today?

6 MR. LEIGHT: I do, Your Honor.

7 THE COURT: Mr. Welch, have you reviewed the plea
8 agreement in detail with Mr. Leight?

9 THE DEFENDANT: Yes, I have.

10 THE COURT: And do you believe that you and the company
11 have had adequate time to discuss this case fully with Mr.
12 Leight?

13 THE DEFENDANT: Yes. Yes, we have.

14 THE COURT: And has he answered any questions that you
15 and the company have had about the case?

16 THE DEFENDANT: I'm sorry?

17 THE COURT: Has Mr. Leight answered any questions that
18 you and the company have had about the case?

19 THE DEFENDANT: Yes. Yes, he has.

20 THE COURT: Mr. Welch, has anything further been agreed
21 to, either orally or in writing, that is not contained in the
22 plea agreement, at least as it relates to this criminal
23 prosecution?

24 THE DEFENDANT: Not that I'm aware of.

25 THE COURT: All right. I will order that the plea

1 agreement be filed.

2 I will find that Mr. Welch, on behalf of the defendant,
3 understands and agrees with the terms contained in the plea
4 agreement.

5 I will defer accepting or rejecting the plea agreement until
6 sentencing, after the Presentence Report has been received and
7 considered.

8 Now, Mr. Welch, on behalf of Freedom Industries, have you
9 received and read and reviewed with your attorney the
10 information, or charging document, that has been proposed?

11 THE DEFENDANT: Yes, I have.

12 THE COURT: And do you understand the charges contained
13 in the information?

14 THE DEFENDANT: Yes, I do.

15 THE COURT: And would you like me to read the
16 information or will you waive the reading of the information?

17 MR. LEIGHT: We'll waive it, Your Honor.

18 THE COURT: All right. As I understand it, Freedom
19 Industries will be pleading guilty to three counts. Count 1
20 charges negligent discharge of a pollutant in violation of 33 U.
21 S. C. Section 1319(c)(1)(A) and 1311; and Count 2 charging
22 unlawful discharge of refuse matter in violation of 33 U. S. C.
23 Section 407 and 411; and Count 3, knowing violation of a permit
24 condition in violation of 33 U. S. C. Sections 1319(c)(2)(A),
25 1311 and 1318. Now, I want to go over those charges and that

1 statute in just a little bit more detail.

2 With regard to Count 1, Section 1319(c)(1)(A) provides in
3 pertinent part that:

4 Any person who negligently violates Section 1311 of this
5 title shall be punished by a fine not less than \$2,500.00, nor
6 more than \$25,000.00 per day of violation, or by imprisonment for
7 not more than one year, which wouldn't apply here, or by both.

8 Section 1311 of Title 33 United States Code provides in
9 pertinent part that:

10 Except as in compliance with this section, and certain other
11 sections of this title, the discharge of any pollutant by any
12 person shall be unlawful.

13 Now, in order to prove that charge against Freedom
14 Industries, the government would have to prove the following
15 elements, each beyond a reasonable doubt, and they are:

16 First, that a pollutant was discharged from a point source
17 into waters of the United State.

18 And, second, the discharge did not occur pursuant to a
19 permit;

20 And, third, Freedom Industries' negligent conduct
21 proximately caused the discharge.

22 I now want to share with you some definitions that apply to
23 what I have just told you.

24 A "pollutant" includes solid wastes, chemical wastes, and
25 industrial, municipal, and agricultural wastes.

1 To "discharge" means to add to the navigable waters of the
2 United States, the contiguous zone, or the ocean.

3 The term "navigable waters of the United States" includes
4 interstate waters, waters which have been or may be susceptible
5 to use in interstate commerce, and tributaries of such waters.

6 A "point source" means any discernible, confined and
7 discrete conveyance, including but not limited to, any pipe,
8 ditch, channel, tunnel, conduit, well, discrete fissure,
9 container, rolling stock, concentrated animal feeding operation,
10 or vessel or other floating craft, from which pollutants are or
11 may be discharged.

12 A "permit" is a permit issued under the National Pollutants
13 Discharge Elimination System by the federal government or a state
14 government.

15 An act is done with "negligence" when a person or, in this
16 case, a company, fails to exercise the degree of care that a
17 person of ordinary prudence would have exercised in similar
18 circumstances.

19 Next, with regard to Count 2, 33 U. S. C. 407 provides in
20 pertinent part that:

21 It shall be unlawful to cause to be discharged or deposited
22 from the shore any refuse matter of any kind or description
23 whatever other than that flowing from streets and sewers and
24 passing therefrom in a liquid state, into any navigable water of
25 the United States without a permit or in violation of a permit.

1 Now, in order to prove that charge against Freedom
2 Industries, the government would have to prove the following
3 elements of that crime, each beyond a reasonable doubt:

4 Freedom Industries caused refuse to be discharged or
5 deposited into a navigable water of the United States;

6 And, second, Freedom Industries did so without a permit or
7 in violation of a permit.

8 Now, I want to share with you some definitions that apply to
9 this charge.

10 The word "cause" means that the result was a probable
11 consequence of Freedom Industries' conduct.

12 The word "refuse" includes all foreign substances and
13 pollutants apart from those flowing from streets and sewers and
14 passing therefrom in a liquid state.

15 "Discharge" means to pour forth or emit.

16 "Deposit" means to lay, place, or throw something down.

17 The term "navigable waters" means the waters of the United
18 States, including the territorial seas.

19 A "permit" is a permit issued by the U. S. Army Corps of
20 Engineers.

21 Finally, Count 3, 33 U. S. C. Section 1319(c)(2)(A) provides
22 in pertinent part that:

23 Any person who knowingly violates Section 1311 or 1318 of
24 this title, or certain other sections, or any permit condition
25 implementing any of such sections shall be guilty of a crime

1 against the United States.

2 Now, in order to prove that charge against Freedom
3 Industries, the government would have to prove the following
4 elements, each beyond a reasonable doubt, and they are:

5 First, that Freedom Industries discharged a pollutant from a
6 point source into the waters of the United States;

7 And, second, Freedom Industries did so without a permit or
8 in violation of a permit;

9 And, finally, that Freedom Industries did so knowingly.

10 Now, I want to share with you some definitions that apply to
11 what I have just told you.

12 I have already defined "discharge". I've already defined
13 "pollutant". I've already defined "point source".

14 For purposes of this count, a "permit" is a permit issued
15 under the National Pollutants Discharge Elimination System by the
16 federal government or a state government.

17 An act is done "knowingly" if done voluntarily and
18 intentionally, and not because of mistake, or accident, or other
19 innocent reason, although it is not necessary that the government
20 prove that Freedom Industries knew that its conduct was illegal.

21 Finally, with regard to all three counts, under the doctrine
22 of respondeat superior, a corporation may be held criminally
23 liable for the criminal acts of its agents. To hold a
24 corporation liable for these actions, the government must
25 establish that the corporate agent's actions were:

1 One, acts of the kind which he is authorized to perform;
2 And, two, were intended, at least in part, to benefit the
3 corporation.

4 Any objection to the elements and definitions as I have
5 described them?

6 MR. WRIGHT: Your Honor, I think Count 3 is slightly
7 different from the way you stated it. I believe that the
8 elements for Count 3, the knowing violations of the permit, would
9 be required by the defendant to have knowingly violated a
10 condition implementing certain sections of the Clean Water Act --
11 and we've charged Sections 1311 and 1318 -- and then the permit
12 was issued pursuant to the National Pollutants Discharge
13 Elimination System and that they did so knowingly. I don't think
14 discharge is a necessary element for Count 3.

15 THE COURT: All right. Well, I need to take a look at
16 that then. I want to get this right.

17 MR. LEIGHT: Your Honor, either way, the company admits
18 to either/or.

19 THE COURT: Well, you know, tempting though it is, I'm
20 not just going to throw up my hands and throw out the formalities
21 that are required for an appropriate plea colloquy. One of those
22 things is, I have to adequately describe the elements to the
23 defendant. Now, I don't think I can do that, and I certainly
24 can't do it off the cuff, so I need to take a look at this. I've
25 got to get this right, so I don't think we can finish this today.

1 So, Mr. Leight, I assume you're from out of town.

2 MR. LEIGHT: Pittsburgh, Your Honor.

3 THE COURT: Are you -- can you come back tomorrow?

4 MR. LEIGHT: Actually, I cannot. I have depositions
5 scheduled tomorrow.

6 THE COURT: How about Thursday?

7 MR. LEIGHT: Next week, I'm free, but the rest of this
8 week, I am not.

9 THE COURT: All right. Let's take a brief break. Let
10 me see if I can get this together now.

11 (Recess taken.)

12 THE COURT: I have a potential solution for this, and
13 that is that would there be any objection to me -- I need to take
14 a look at this, but would there be any objection to me going
15 ahead and waiting until sentencing to describe the elements with
16 regard to Count 3?

17 MR. WRIGHT: No objection, Your Honor.

18 MR. LEIGHT: No objection Your Honor

19 THE COURT: All right. Very well. That's the way I'm
20 going to proceed.

21 I left something in my office. I'll be right back.

22 (Recess taken.)

23 THE COURT: All right. Next, I want to talk with you,
24 Mr. Welch, about the federal sentencing guidelines. They are
25 advisory, meaning they're not mandatory or don't have to be

1 followed, but they'll nevertheless play an important role in this
2 case from here on out.

3 This Court will consider the factors set forth in 18 U. S.
4 C. Section 3553(a), including the advisory guidelines in
5 determining the appropriate sentence in this case.

6 I am now going to ask some questions that will help me to
7 understand your understanding, and that of Freedom Industries, as
8 to the federal sentencing guidelines.

9 Have you, on behalf of the corporation, discussed with your
10 attorney the various factors which apply in determining what the
11 sentence in this case may be under the advisory guidelines?

12 THE DEFENDANT: Yes, I have.

13 THE COURT: And do you understand that on this
14 information, you, Freedom Industries, cannot, in any event,
15 receive a greater sentence than the statutory maximum?

16 THE DEFENDANT: I understand.

17 THE COURT: I just realized that I didn't go over the
18 penalty with you, so I need to do that before we go over the
19 guidelines.

20 All right. With regard to Count 1, Freedom Industries faces
21 a fine of not less than \$2,500.00, nor more than \$25,000.00 per
22 day of violation; alternatively, a maximum fine of \$200,000.00,
23 or twice the gross pecuniary gain or loss resulting from
24 Freedom's conduct, whichever is greater; and a maximum term of
25 imprisonment [sic] of five years; a mandatory special assessment

1 of \$125,000.00; and restitution could be ordered if it were found
2 to be applicable.

3 With regard to Count 2, a fine of up to \$25,000.00 per day
4 of violation; alternatively, a maximum fine of \$200,000.00, or
5 twice the gross pecuniary gain or loss resulting from Freedom's
6 conduct, whichever is greater, and a maximum term of probation of
7 five years; and a mandatory special assessment of \$125.00.

8 With regard to Count 3, a fine of not less than \$5,000.00,
9 nor more than \$50,000.00 per day of violation; alternatively, a
10 maximum fine of \$500,000.00, or twice the gross pecuniary gain or
11 loss resulting from Freedom's conduct, whichever is greater; and
12 a minimum term of probation of one year and a maximum of -- term
13 of probation of five years; and a mandatory special assessment of
14 \$400.00, for a combined maximum sentence of \$900,000.00, or twice
15 the gross pecuniary gain or loss resulting from previous conduct,
16 whichever is greater; 1 to 5 years of probation; a special
17 assessment of \$650.00; and restitution, if it were found to be
18 applicable.

19 All right. With that then, do you understand that, on this
20 information, Freedom cannot in any event receive a greater
21 sentence than the statutory maximums that I explained a moment
22 ago?

23 THE DEFENDANT: Yes. I think, under Count 1, you said
24 a five-year term of prison rather than probation.

25 THE COURT: I meant probation. I'm sorry.

1 THE DEFENDANT: That's okay. Yes, I understand.

2 THE COURT: All right. Do you understand that the
3 Court will not determine the sentence for this case until a later
4 date, when a Presentence Report has been completed, and both
5 Freedom Industries and the government have had an opportunity to
6 challenge the facts and analysis reported by the probation
7 officer?

8 THE DEFENDANT: Yes, I do.

9 THE COURT: Do you understand that under a concept
10 known as "relevant conduct", this Court, in determining the Total
11 Offense Level for sentencing purposes under the guidelines, may
12 take into account any conduct, circumstances or injuries relevant
13 to the crime of which Freedom may be convicted?

14 THE DEFENDANT: Yes, I do.

15 THE COURT: Do you understand that after the Court has
16 determined what advisory guidelines apply to this case, the Court
17 has the authority to vary or depart from the advisory guidelines
18 and impose a sentence that is more severe or less severe than the
19 sentence called for by the guidelines?

20 THE DEFENDANT: Yes, I understand that.

21 THE COURT: Do you understand that in determining your
22 sentence, the Court is obligated to calculate the applicable
23 sentencing guideline range, and when I say "your sentence", I
24 mean Freedom's, and to consider that range, possible departures
25 under the guidelines, and other sentencing factors under 18 U. S.

1 C. Section 3553(a)?

2 THE DEFENDANT: Yes, I do.

3 THE COURT: Do you understand that if the Court accepts
4 Freedom Industries' plea of guilty and the sentence ultimately
5 imposed upon Freedom Industries is more severe than it had hoped
6 for expected, it will still be bound by its guilty plea and would
7 have no right to withdraw it?

8 THE DEFENDANT: I do understand.

9 THE COURT: All right. Mr. Welch, Freedom has the
10 right to have Count 3 presented to a federal grand jury.

11 Am I right about that?

12 MR. WRIGHT: Your Honor, frankly, I'm not sure, so we
13 put that language in there. I think there's case law going
14 either way with a corporation, whether they have a right to an
15 indictment. Certainly, they're not subject to imprisonment, but
16 we put the language in there about waiving whatever right it
17 might have.

18 THE COURT: And Count 3 is a felony, correct?

19 MR. WRIGHT: Yes, Your Honor.

20 THE COURT: All right. Well, I'm going to go ahead and
21 go through this way anyway based on that.

22 I want to explain the grand jury process to you, at this
23 point.

24 A grand jury is composed of at least 16, and not more than
25 23 persons. And at least 12 grand jurors must find that there is

1 probable cause to believe that Freedom committed the crime with
2 which it is charged before it may be indicted.

3 Now, do you see any benefit to Freedom of having this case
4 presented to a federal grand jury?

5 THE DEFENDANT: No, sir.

6 THE COURT: And do you see any prejudice or
7 disadvantage to Freedom of not having the case presented to a
8 grand jury?

9 THE DEFENDANT: No, sir.

10 THE COURT: All right. Your counsel has been provided
11 with a written Waiver of Indictment Form. Have you had a chance
12 to review that?

13 THE DEFENDANT: Yes. Yes, I have.

14 THE COURT: And do you understand it?

15 THE DEFENDANT: Yes, I have.

16 THE COURT: And have you had -- has your counsel
17 explained anything -- anything that you may have had questions
18 about regarding the Waiver of Indictment Form?

19 THE DEFENDANT: I understand.

20 THE COURT: All right. And are you prepared then to
21 execute the Waiver of Indictment on behalf of Freedom Industries?

22 THE DEFENDANT: Yes, I have.

23 THE COURT: All right.

24 MR. LEIGHT: May I approach?

25 THE COURT: You may.

1 All right. I'll note for the record that the defendant, by
2 Mr. Welch, has signed and dated the Waiver of Indictment Form, it
3 has been endorsed by counsel for the defendant, and I am now
4 signing it, and I will order that it be made a part of the
5 recording for this proceeding.

6 Next, Mr. Welch, I want to go over with you Freedom's trial
7 and constitutional rights.

8 Freedom Industries has the right to plead not guilty and
9 maintain a not guilty plea throughout these proceedings,
10 including at trial.

11 It has the right to be represented by counsel.

12 It has a right to a speedy and public trial by a jury
13 composed of citizens of this district.

14 It has the right to confront and have its attorney cross
15 examine witnesses and have its attorney move to suppress any
16 evidence it believes was illegally or unconstitutionally
17 obtained.

18 Freedom Industries has -- I don't know how this would apply,
19 but I'm going to go over it anyway. Freedom has the right not to
20 testify or otherwise incriminate itself, and its exercise of that
21 right cannot be held against it.

22 Freedom has the right to have the government come in here
23 and prove its case beyond a reasonable doubt.

24 The jury's verdict would have to be unanimous.

25 The company has the right to present evidence on its own

1 behalf, I suppose to have agents testify on its own behalf at
2 trial, and to subpoena witnesses to testify for the company.

3 On behalf of Freedom, do you understand all of these rights?

4 THE DEFENDANT: Yes, I do.

5 THE COURT: Any of them that you don't understand or
6 that you have questions about?

7 THE DEFENDANT: I don't. I understand.

8 THE COURT: And, other than Freedom's right to counsel,
9 do you understand that Freedom is giving up all of these rights
10 by entering a plea of guilty?

11 THE DEFENDANT: Yes, I do.

12 THE COURT: All right. And do the officers and
13 directors of Freedom have that understanding, as well?

14 THE DEFENDANT: Yes, they do.

15 THE COURT: Do you understand that once a plea of
16 guilty is entered, there's nothing going to be any trial, no jury
17 verdict, and no findings of innocence or guilt based on disputed
18 evidence presented to me or to a jury?

19 THE DEFENDANT: Yes. I understand.

20 THE COURT: Do you further understand that by pleading
21 guilty, Freedom Industries will waive any argument for the
22 disqualification of the U. S. Attorney's Office in this case?

23 THE DEFENDANT: Yes. Yes, I do.

24 THE COURT: And, on behalf of Freedom Industries, do
25 you believe that you and the company fully understand the

1 consequences of entering a plea of guilty?

2 THE DEFENDANT: Yes, I do, and the company.

3 THE COURT: And, Mr. Leight, having reviewed this case
4 and the plea agreement in detail with your client, do you believe
5 that Mr. Welch and the officers and directors of Freedom
6 Industries fully understand their rights and the consequences of
7 entering a plea of guilty?

8 MR. LEIGHT: I do, Your Honor.

9 THE COURT: All right. I note that there is a detailed
10 Stipulation of Facts. Is there any objection to the Court
11 utilizing that stipulation in its consideration of a factual
12 basis for the pleas?

13 MR. WRIGHT: No objection, Your Honor.

14 MR. LEIGHT: The defendant has none, Your Honor.

15 THE COURT: All right. Very well.

16 Mr. Welch, will you please stand?

17 As to Count 1 of -- the charge contained in Count 1 of the
18 information, how does Freedom Industries plead, guilty or not
19 guilty?

20 THE DEFENDANT: Guilty.

21 THE COURT: As to Count 2 contained in the information
22 and the charge contained therein, how does Freedom Industries
23 plead, guilty or not guilty?

24 THE DEFENDANT: Guilty.

25 THE COURT: And, as to Count 3 and the charge contained

1 therein in the information, how does Freedom Industries plead,
2 guilty or not guilty?

3 THE DEFENDANT: Guilty

4 THE COURT: You may be seated.

5 Your counsel has been provided with a written Plea of Guilty
6 Form. I would ask that you go over that with him, if necessary,
7 and then I would ask him to sign it and tender it to the Court.

8 MR. LEIGHT: Your Honor, may I approach?

9 THE COURT: You may.

10 All right. I'll note for the record that the defendant, by
11 Mr. Welch, has signed and dated the written Plea of Guilty Form,
12 it has been witnessed by Mr. Leight, and I will be -- I will
13 order that it be made part of the record for this proceeding.

14 Mr. Welch, is this plea the result of any threat, or
15 coercion, or harassment of either you or Freedom Industries by
16 anyone?

17 THE DEFENDANT: No, sir.

18 THE COURT: Is it the result of any promise or
19 inducement, other than those contained in the plea agreement?

20 THE DEFENDANT: No, sir.

21 THE COURT: Is Freedom Industries pleading guilty to
22 protect anyone?

23 THE DEFENDANT: No, sir.

24 THE COURT: Is Freedom Industries acting voluntarily
25 and of its own free will in entering this guilty plea?

1 THE DEFENDANT: Yes.

2 THE COURT: Has anyone promised or predicted the exact
3 sentence which will be imposed?

4 THE DEFENDANT: No.

5 THE COURT: Do you understand that no one could know at
6 this time the exact sentence which will be imposed?

7 THE DEFENDANT: Yes.

8 THE COURT: Has Freedom's counsel adequately
9 represented it in this matters?

10 THE DEFENDANT: Yes.

11 THE COURT: Has Freedom's counsel left anything undone
12 which you or the company think should have been done?

13 THE DEFENDANT: No.

14 THE COURT: Have you, Freedom Industries, or its
15 attorneys found any defense to the charges contained in the
16 information?

17 THE DEFENDANT: No.

18 THE COURT: And is Freedom Industries, in fact, guilty
19 of the crimes charged in the information? In other words, did
20 they commit those crimes?

21 THE DEFENDANT: Yes.

22 THE COURT: All right. I will find that Mr. Welch is
23 competent and capable of entering an informed plea on behalf of
24 Freedom Industries; that the plea is freely and voluntarily made;
25 that Freedom Industries and Mr. Welch understand the nature of

1 the charges and are aware of the consequences of the plea.

2 I will find that Freedom Industries and Mr. Welch understand
3 Freedom's rights and understands that Freedom is giving up these
4 rights by entering a plea of guilty.

5 I will defer a factual basis finding.

6 I will accept each of the -- the pleas of guilty to the
7 three counts of the information and will defer adjudging the
8 defendant guilty until the time of sentencing.

9 As I indicated earlier, I will ask the probation officer to
10 prepare a Presentence Investigation Report.

11 Mr. Welch, it is important that Freedom and its officers,
12 directors and agents cooperate fully with the probation officer
13 in the preparation of the Presentence Report. If it fails to do
14 so, it could be subject to the enhancement of its sentence or the
15 forfeiture of certain sentence reductions for which it might
16 otherwise be eligible.

17 It is also important that the company not commit any
18 additional crimes between now and sentencing, as there may be
19 additional punishments imposed for committing additional crimes.

20 I will set the matter for sentencing on June 29th, 2015 at
21 10:00 a.m. and I will put my other presentencing dates in my
22 post-plea order.

23 Anything else we need to take up in this matter?

24 MR. WRIGHT: No, Your Honor.

25 MR. LEIGHT: No, sir.

1 THE COURT: All right. Thank you.

2 (Proceedings concluded at 4:22 p.m., May 1, 2015.)

3
4
5 CERTIFICATION:

6 I, Ayme A. Cochran, Official Court Reporter, certify that
7 the foregoing is a correct transcript from the record of
8 proceedings in the matter of United States of America, Plaintiff
9 v. Freedom Industries, Inc., Defendant, Criminal Action No.
10 2:14-cr-00175, as reported on March 23, 2015.

11
12 s/Ayme A. Cochran, RMR, CRR

May 1, 2015

13 Ayme A. Cochran, RMR, CRR

DATE